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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL S. MONTGOMERY,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE,

14 Defendant.

CASE NO. C12-0908JLR

ORDER DENYING MOTION
FOR EAJA FEES

15 Before the court is Plaintiff Michael Montgomery's motion for attorney's fees
16 pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. (Mot. (Dkt.
17 # 27).) Mr. Montgomery wants the government to pay his attorney's fees for this social
18 security appeal because, he claims, the government took a position that did not have a
19 reasonable basis in law or fact. (*See id.*) The court has examined the record and the
20 governing law and concludes that Mr. Montgomery is wrong—the government's position
21 was substantially justified. Accordingly, an award of attorney's fees under the EAJA is
22 not appropriate in this case. The court DENIES Mr. Montgomery's motion.

I. BACKGROUND

This is a social security case. Mr. Montgomery appealed a final decision of the Social Security Administration Commissioner denying his application for Disability Insurance Benefits. (Compl. (Dkt. # 1).) The Commissioner denied Mr. Montgomery benefits following his initial application, did so again on reconsideration, then held a hearing in front of an Administrative Law Judge (“ALJ”) to determine if an award of benefits was appropriate. (Administrative Record (“AR”) at 16, 37-72.) At the hearing, the ALJ considered testimony and documentary evidence, including a substantial number of medical opinions—some of which the ALJ credited and others which the ALJ did not credit. (*See id.*) The ALJ ultimately decided that an award of benefits was not warranted, and Mr. Montgomery appealed that decision to this court. (*See Compl.*)

12 On appeal, Magistrate Judge Mary Alice Theiler recommended reversing the
13 ALJ's decision and remanding the case for further proceedings. (Report &
14 Recommendations ("R&R") (Dkt. # 22) at 1.) The court agreed with Magistrate Judge
15 Theiler and adopted the R&R after a thorough review of the record. (3/11/13 Order (Dkt.
16 # 25).) Magistrate Judge Theiler found that the ALJ made mistakes in the hearing that
17 warranted reversal. (*See* R&R.) Specifically, Magistrate Judge Theiler found that the
18 ALJ did not properly consider the testimony of several medical professionals. (*See id.*)
19 The court agreed with Magistrate Judge Theiler on these points and adopted her
20 reasoning in its entirety. (3/11/13 Order.)

21 First, the court found that the ALJ did not properly credit the testimony of Dr.
22 Luci Carstens. (R&R at 6-9.) Dr. Carstens examined Mr. Montgomery and assessed his

1 cognitive limitations. (*Id.* at 6.) The court found that the ALJ “did not give significant
 2 weight to these cognitive limitations” and did not adequately support its decision to
 3 discredit Dr. Carstens’ testimony. (*Id.* at 6-8.) Specifically, the court found that the
 4 reasons given by the ALJ for discounting Dr. Carstens’ testimony were not supported by
 5 substantial evidence in the record and that, accordingly, the ALJ committed reversible
 6 error. (*Id.* at 8.)

7 Second, the court found that the ALJ did not properly credit the testimony of Dr.
 8 Sara Rogers, a primary care physician, and Mr. Steve Herndon, a mental health provider,
 9 both of whom treated Mr. Montgomery. (*Id.* at 12-13.) The law says that an ALJ cannot
 10 reject a treating physician’s opinions without “specific and legitimate reasons” supported
 11 by substantial evidence. (*Id.* at 13 (quoting *Lester v. Chater*, 81 F.3d 821, 830-31 (9th
 12 Cir. 1995)).) The court found that the ALJ did not provide sufficiently specific and
 13 legitimate reasons and that, accordingly, the ALJ erred in its decision to discount the
 14 testimony of Dr. Rogers and Mr. Herndon. (*Id.* at 12-13.)

15 After the court issued its ruling, Mr. Montgomery filed the present motion for
 16 attorney’s fees under the EAJA, claiming that he is the “prevailing party” and that the
 17 government had no “substantial justification” for its position. (*See Mot.* at 1-2.)

18 **II. ANALYSIS**

19 **A. “Prevailing Party” and “Substantial Justification”**

20 The EAJA provides that attorney’s fees may be awarded to a “prevailing party” in
 21 an action involving the United States if the government’s position in the action, including
 22 the underlying administrative proceedings, was not “substantially justified”:

1 Except as otherwise specifically provided by statute, a court shall award to
2 a prevailing party other than the United States fees and other expenses, in
3 addition to any costs awarded pursuant to subsection (a), incurred by that
4 party in any civil action (other than cases sounding in tort), including
5 proceedings for judicial review of agency action, brought by or against the
6 United States in any court having jurisdiction of that action, unless the
7 court finds that the position of the United States was substantially justified
8 or that special circumstances make an award unjust.

9 28 U.S.C. § 2412(d)(1)(A). A party “prevails” for the purposes of the EAJA if the denial
10 of its benefits is reversed and remanded, regardless of whether benefits ultimately are
11 awarded. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1257 (9th Cir. 2001).

12 The government’s position is “substantially justified” if the position had a
13 reasonable basis in both law and fact—in other words, if a reasonable person could think
14 it is correct. *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988); *Sampson v. Chater*,
15 103 F.3d 918, 921 (9th Cir. 1996). The question of substantial justification is one that
16 lies within the discretion of the trial court. *Pierce*, 487 U.S. at 562. The government’s
17 position does not need to be justified “to a high degree,” it just needs to be “justified in
18 substance or in the main.” *Id.* at 565. “In evaluating the government’s position to
19 determine whether it was substantially justified, we look to the record of both the
20 underlying government conduct at issue and the totality of the circumstances present
21 before and during litigation.” *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987). The
22 government’s position cannot be substantially justified if it was based on violations of the
Constitution, federal statute, or the agency’s own regulations. *Sampson*, 103 F.3d at 921
(citing *Mendenhall v. Nat’l Transp. Safety Bd.*, 92 F.3d 871, 874 (9th Cir. 1996)).
However, the government’s position is not automatically unjustified just because the

1 government does not prevail on appeal, nor does the failure to prevail give rise to a
2 presumption that the position was not substantially justified. *Pierce*, 487 U.S. at 569; *Al-*
3 *Harbi v. I.N.S.*, 284 F.3d 1080, 1085 (9th Cir. 2002); *Thangaraja v. Gonzales*, 428 F.3d
4 870, 874 (9th Cir. 2005). Furthermore, the government has the burden of proving
5 substantial justification. *Hardisty v. Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010),
6 *cert. denied*, 131 S.Ct. 2443 (2011).

7 **B. The Government Has Demonstrated That Its Position Was Substantially
Justified**

8 The only issue the parties contest in this motion is whether the government's
9 position in this litigation was substantially justified. As explained below, the court
10 concludes that it was, having examined the record of both the underlying government
11 conduct at issue and the totality of the circumstances present before and during litigation.
12 See *Bowen*, 825 F.2d at 1330. Specifically, the court rules that the government has
13 carried its burden of demonstrating that its position has a reasonable basis in both law and
14 fact and that a reasonable person could think it is correct. See *Hardisty*, 592 F.3d at 1076
15 n.2; *Pierce*, 487 U.S. at 566 n.2; *Sampson*, 103 F.3d at 921.

16 First, with respect to Dr. Carstens' medical opinion, a reasonable person could
17 have agreed with the government's position. The error with respect to Dr. Carstens'
18 opinion was that the ALJ did not give good enough reasons to discredit Dr. Carstens'
19 testimony. (See R&R at 6-9.) The court found that this error warranted reversal. (See
20 3/11/13 Order.) However, it is not as though the ALJ gave no reasons at all for
21 discounting Dr. Carstens' testimony. To the contrary, the ALJ gave several reasons,
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1 noting that Dr. Carstens' testimony was "not entirely consistent" with other findings, was
 2 "not persuasive," was "based largely on the claimant's subjective reports," and was "not
 3 consistent with the record or well supported." (R&R at 6-7.) The court found that not all
 4 of these reasons were supported by substantial evidence (*See id.* at 6-9; 3/11/13 Order.),
 5 but this was not an open and shut decision. It was a much closer call than Mr.
 6 Montgomery makes it out to be. (*See generally* Mot.) The court concludes that based on
 7 the evidence in the record and looking at the totality of the circumstances, a reasonable
 8 person could have taken the position that substantial evidence supported some or all of
 9 the ALJ's reasons. *See Bowen*, 825 F.2d at 1330. Every case has a winner and a loser—
 10 but it would be wrong to assume this automatically means the losing side's position was
 11 not substantially justified. *Pierce*, 487 U.S. at 569; *Al-Harbi*, 284 F.3d 1080 at 1085.

12 The government further justified its position by advancing a harmless error
 13 argument. (*See, e.g.*, Responsive Br. (Dkt. # 20) at 9.) The government argued that any
 14 error by the ALJ made no difference in the outcome of the case. (*See, e.g., id.*) Again,
 15 the court ruled against the government on this argument, but it was a close question. A
 16 reasonable person could have found that the error was harmless. *See Pierce*, 487 U.S. at
 17 566 n.2; *Sampson*, 103 F.3d at 921. Accordingly, the government's position with respect
 18 to Dr. Carstens was substantially justified even though the court ultimately did not agree
 19 with it. *Pierce*, 487 U.S. at 569; *Al-Harbi*, 284 F.3d 1080 at 1085. The government's
 20 position does not need to be justified "to a high degree." *Pierce*, 487 U.S. at 565.

21 The court reaches the same conclusion with respect to the testimony of Dr. Rogers
 22 and Mr. Herndon. The court found that the ALJ did not provide sufficiently specific and

1 legitimate reasons for discounting the testimony of Dr. Rogers and Mr. Herndon. (*Id.* at
2 12-13.) Again though, it is not as though the ALJ provided no reasons whatsoever. The
3 ALJ cited specific testimony in support of the decision (*see R&R* at 12-13) and, although
4 the court ultimately ruled that these reasons were not specific and legitimate enough, the
5 government's position nevertheless had a reasonable basis in law and fact. *See Pierce*,
6 487 U.S. at 566 n.2; *Sampson*, 103 F.3d at 921. That is, a reasonable person could have
7 found it to be correct. Accordingly, and having reviewed the record, the court finds that
8 the government has carried its burden to show that its position in this case and on appeal
9 was substantially justified. *See Hardisty*, 592 F.3d at 1076 n.2.

10 This case does not resemble cases where the government was found not to be
11 substantially justified in its position. For example, it is different from the *Sampson* case
12 cited above. 103 F.3d 918. In *Sampson*, the Commissioner “completely disregarded
13 substantial evidence . . . even though there was no contradictory evidence.” *Id.* at 921.
14 That did not happen here. Here, there were plainly two reasonable sides to the issues
15 decided by the ALJ. Thus, unlike in *Sampson*, the government was substantially justified
16 in denying Mr. Montgomery’s initial application and in defending the ALJ’s conclusions
17 on appeal. *See id.* at 921-22. Likewise, this case is different from the *Barry* case cited
18 above, where the government took three legal positions that cut against “well
19 established” precedent, were “plainly false,” and “rested on patently unreasonable
20 readings of the law.” 825 F.2d at 1331. The government took no such positions in this
21 case. Instead, the government merely argued that the evidence supported its position
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1 within an established legal framework. The court ultimately disagreed, but the
2 government's arguments were not "plainly false" or "patently unreasonable." *See id.*

3 Nor is this case controlled by *Thangaraja*, 428 F.3d 870. In that case, the court
4 found that the government's position was not substantially justified because many of the
5 government's positions were "entirely unsupported by the record." *Id.* at 875. The court
6 focused on Ninth Circuit precedent indicating that it would be only a "'decidedly unusual
7 case in which there is a substantial justification under the EAJA even though the agency's
8 decision was reversed as lacking in reasonable, substantial and probative evidence in the
9 record.'" *Id.* at 874 (citing *Al-Harbi*, 284 F.3d at 1085). Here, the court has not found
10 that any of the government's positions were "entirely unsupported by the record," *see id.*
11 at 875, nor is the court vacating the ALJ's decision on all points. Instead, the court has
12 simply reversed the ALJ on certain findings and asked for the ALJ to support those
13 findings with specific and legitimate reasons. (*See R&R* at 6-9, 12-13.)

14 Instead, this case is more like *Al-Harbi*, the case cited in *Thangaraja*. 284 F.3d
15 1080. There, the Ninth Circuit found that the government's position was substantially
16 justified even as the court vacated certain findings below as not being supported by
17 substantial evidence. *See id.* at 1085. The Ninth Circuit focused on the fact that "'the
18 EAJA . . . favors treating a case as an inclusive whole, rather than as atomized line
19 items.'" *Id.* at 1084-85 (citing *United States v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996)).
20 Thus, the Ninth Circuit found substantial justification given that it "upheld the
21 government's central positions" and that "the government's litigation position . . . was
22 sufficiently justified on the record . . . as to preclude ready rejection." *Id.* at 1085. The

1 court concluded that Ninth Circuit precedent required it to “hold the government’s
2 litigation position as a whole substantially justified, albeit not ultimately adequate to
3 sustain the agency’s decision.” *Id.* This is the same situation the court is faced with here.
4 As explained above, the government’s litigation position as a whole was substantially
5 justified and precludes ready rejection. *See id.* This case resembles *Al-Harbi* in that the
6 court did not reject the government’s position as a whole, but only certain narrow aspects
7 of it. (*See generally* R&R.) The court upheld most of the ALJ’s findings. (*See id.*) The
8 court has reviewed the record and the government’s positions as an “inclusive whole”
9 and, having done so, concludes that the government’s positions were substantially
10 justified. *See id.*; *see also United States v. Rubin*, 97 F.3d 373 (9th Cir. 1996).

11 Mr. Montgomery’s arguments to the contrary do not persuade to the court. In his
12 briefing, Mr. Montgomery does not address this case in any detail, instead simply reciting
13 formulaic arguments and presenting stock language stating that he is entitled to fees.
14 (*See Mot.*; *see also* Reply (Dkt. # 29).) This does nothing to change the fact that the
15 government has carried its burden to show fees are not warranted under the EAJA.

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1 **III. CONCLUSION**

2 For the foregoing reasons, the court DENIES Mr. Montgomery's motion for
3 attorney's fees pursuant to the EAJA (Dkt. # 27).

4 Dated this 26th day of June, 2013.

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8 JAMES L. ROBART
9 United States District Judge
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